(3)

No. 03-364

NOV 18 2003

IN THE

Supreme Court of the United States

ZACHARY TAYLOR, AS EXECUTOR OF THE ESTATE OF JACK T. TAYLOR, JR., AND THE TAYLOR FAMILY PARTNERSHIP,
Petitioners,

v.

EUGENE LOBATO, EMILIO LOBATO JR., MICHAEL J. VIGIL, NORMAN MAESTAS, EUGENE MARTINEZ, CORPUS GALLEGOS BY AND THROUGH HIS CONSERVATOR YVETTE GALLEGOS, AND ZACK BERNAL,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Colorado

REPLY BRIEF

ALBERT B. WOLF
RAYMOND P. MICKLEWRIGHT
WOLF & SLATKIN, P.C.
44 Cook Street, Suite 1000
Denver, Colorado 80206
(303) 355-2999

CARTER G. PHILLIPS*
STEPHEN B. KINNAIRD
SIDLEY AUSTIN BROWN & WOOD LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000

KEITH D. TOOLEY
KATHRYN HAIGHT
WELBORN SULLIVAN MECK & TOOLEY, P.C.
821 17th Street, Suite 500
Denver, Colorado 80202
(303) 830-2500

Counsel for Petitioners

November 18, 2003 * Counsel of Record

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
REPLY BRIEF	1
I. THIS COURT HAS JURISDICTION TO REVIEW THE DUE PROCESS ISSUES DECIDED BELOW	1
II. RESPONDENTS' OBJECTIONS TO REVIEW OF THE FEDERAL PROPERTY LAW QUESTIONS LACK FORCE	8
CONCLUSION	10

TABLE OF AUTHORITIES

CASES Page

Cox Broad. Corp. v. *Cohn*, 420 U.S. 469 (1975)... 5
Davis v. *O'Hara*, 266 U.S. 314 (1924)..... 6
Dewey v. *Des Moines*, 173 U.S. 193 (1899)..... 4
Hathorn v. *Lovorn*, 457 U.S. 255 (1982)..... 6
Heath v. *Alabama*, 474 U.S. 82 (1985) 3
Hewitt v. *Glaser Land & Livestock Co.*, 626 P.2d 268 (Nev. 1981) 8
Illinois v. *Gates*, 462 U.S. 213 (1983)..... 3
Kemmerer Coal Co. v. *Brigham Young Univ.*, 723 F.2d 54 (10th Cir. 1983)..... 8
Mullane v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950)..... 7
Orr v. *Orr*, 440 U.S. 268 (1979) 3
Radio Station WOW, Inc. v. *Johnson*, 326 U.S. 120 (1945)..... 7
Raley v. *Ohio*, 360 U.S. 423 (1959) 3
Shelledy v. *Lore*, 836 P.2d 786 (Utah 1992)..... 8
Tameling v. *United States Freehold & Emigration Co.*, 93 U.S. 644 (1876)..... 10
Taylor v. *Jaquez*, Civ. No. 96-Z-776 (D. Colo. Aug. 22, 1996), *aff'd*, 126 F.3d 1294 (10th Cir. 1997), *cert. denied*, 523 U.S. 1005 (1998)..... 6
United States v. *Haddon*, 550 F.2d 677 (1st Cir. 1977)..... 8
Urie v. *Thompson*, 337 U.S. 163 (1949)..... 6

STATUTE

28 U.S.C. § 1257 5

RULE

Sup. Ct. R. 12.6 7

TABLE OF AUTHORITIES – continued

SCHOLARLY AUTHORITY Page

Robert L. Stern et al., *Supreme Court Practice* (8th ed. 2002) 3, 4, 6

REPLY BRIEF

Petitioners have demonstrated that the decisions below of the Colorado Supreme Court create multiple conflicts with the decisions of this Court, other state supreme courts, and the federal courts of appeals on important issues of due process, federal territorial law, and the effects of congressional confirmations of title on land rights in the West. Pet. 17-30. Respondents cannot, and barely attempt to, deny the conflicts of authority identified in the petition. Instead, they claim that for a host of reasons this Court lacks jurisdiction to review the concededly final judgment below. Their arguments are unsound, and indeed are based on patent misconceptions of the law governing this Court's jurisdiction and mischaracterizations of the proceedings and decisions below.

I. THIS COURT HAS JURISDICTION TO REVIEW THE DUE PROCESS ISSUES DECIDED BELOW.

Respondents claim that this Court lacks jurisdiction over the federal due process questions presented because (1) the Colorado Supreme Court allegedly based its notice ruling on the Colorado Torrens Act; (2) the due process issues were not pressed or passed on below; and (3) petitioners did not seek review in this Court of the original due process ruling in *Rael* v. *Taylor* in 1994. None of these arguments provides a basis for denying certiorari.

1. Respondents assert that petitioners have "failed to identify any federal questions." Opp. 3. They contend that the Colorado Supreme Court based its notice ruling on the state statute and not the Due Process Clause of the Fourteenth Amendment, noting that the Colorado Supreme Court implied a requirement of "reasonable diligence" in the Torrens Act, Pet. App. 153a. Opp. 22-23. This is a startling mischaracterization of the ruling below, which expressly decided the notice issue on federal constitutional grounds precisely because respondents *would have had no recourse under the state statute* to attack petitioners' title for deficient

notice. In the section of the opinion below, tellingly entitled "Notice Required By Due Process," Pet. App. 12a, the Colorado Supreme Court stated that, under the Torrens Act,

> a challenge must be initiated within 90 days of registration and successful claimants may recover only damages, not property rights. § 38-36-131, 10 C.R.S. (2002). Laudable as these goals are, however, the act must yield to the United States Constitution.
>
> To have a preclusive effect on the landowners' current claims, Taylor's Torrens judgment must satisfy the minimum procedural requirements of the Due Process Clause of the Fourteenth Amendment. *Kremer v. Chemical Constr. Corp.*, 456 U.S. 461, 481, 102 S. Ct. 1883, 72 L.Ed.2d 262 (1982). Although section 118-10-31, 5 C.R.S. (1953), of the 1960s Torrens Act forecloses any challenges to a court's decree in a Torrens action and although the essential purpose of the Torrens Act is to eliminate attack on decrees of confirmation, the Torrens bar on future challenges cannot be sustained where constitutional deficiencies of notice are present. *Rael v. Taylor*, 876 P.2d at 1224.

Id. at 13a (citations omitted). The court went on to state that, in *Rael*, "[w]e held that to evaluate the sufficiency of publication notice, *due process requires* a court to determine 'whether under all the circumstances the means selected was reasonably calculated to reach interested parties and whether the party giving notice had exercised due diligence to ascertain the identities of interested parties.'" *Id.* at 15a (emphasis added). Applying the second prong of its federal constitutional test, the state court held that "Taylor's actions were not sufficiently diligent to *comply with due process*." *Id.* at 25a (emphasis added).

This federal constitutional holding then became the basis for the state court's ruling that the 1960's Torrens action was not *res judicata* as to certain respondents. Pet. App. at 29a.

As the state court summed up its holding: "Applying the due process analysis of *Rael* to the facts developed on remand, we hold that those 1960s landowners not personally named and served in the 1960s Torrens action, or their successors, are not barred from bringing their present claims." *Id.* The Colorado Supreme Court thus could not have been clearer that it rendered its holding on federal constitutional grounds, and this Court clearly has jurisdiction to review this holding.[1]

2. This Court will decline review of federal questions that were "not pressed or passed upon in the state court." *Heath* v. *Alabama*, 474 U.S. 82, 87 (1985); cf. *Illinois* v. *Gates*, 462 U.S. 213, 218-19 (1983) (leaving open the question whether this rule is jurisdictional or prudential). Respondents claim that this Court cannot review the due process questions presented in the petition because (allegedly) petitioners did not adequately argue these points below. Opp. 20-21.

But respondents ignore that the Colorado Supreme Court did in fact pass on the questions below, and that is all that matters. Respondents fail to heed the disjunctive nature of the "pressed *or* passed upon" test, and disregard the "'elementary rule that it is irrelevant to inquire ... when a Federal question was raised in a court below when it appears that such question was actually considered and decided.'" *Orr* v. *Orr*, 440 U.S. 268, 274-75 (1979) (omission in original); *Raley* v. *Ohio*, 360 U.S. 423, 436 (1959) ("There can be no question as to the proper presentation of a federal claim when the highest state court passes on it."); Robert L. Stern et al., *Supreme Court Practice* § 3.19, at 185 (8th ed.

---

[1] Indeed, the Torrens Act could not have been the basis of the decision below, not only because (as the state court recognized) statutory attacks on title are barred 90 days after the decree, Pet. App. 13a, but also because the issue of compliance with the Torrens Act notice requirements had been finally decided in the 1960's federal court action and was itself *res judicata*. *See* Pet. 10 (quoting federal court holding "'[t]hat the statutory requirements of service, publication, and notice have been met and fulfilled'" (alteration in original)).

2002) ("Once it is clear that the highest state court has actually passed upon on the federal question, ... [a]n irrebuttable presumption is created that the federal question was timely and properly raised.").

There is no question that the Colorado Supreme Court passed upon the due process questions presented – these are the very holdings of the case. Indeed, as noted above, the Colorado Supreme Court expressly declared that it "held" that the Due Process Clause imposes a dual standard, requiring not only that the statutory notice requirements be reasonably calculated to inform claimants of the action, but also that the private litigant be reasonably diligent in ascertaining parties to serve. Pet. App. 15a. It then held that Taylor failed to comply with due process, *id.* at 25a, and proceeded to "hold that those 1960s landowners not personally named and served in the 1960s Torrens action, *or their successors*, are not barred from bringing their present claims." *Id.* at 29a (emphasis added). The questions raised in this petition are thus cleanly presented for this Court's review.[2]

---

[2] Although irrelevant, there is no basis for respondents' contention, unsupported by citation to the record, that the due process issues were not properly pressed below, *see* Opp. 20-21. In their briefs in the Colorado Supreme Court in *Rael* defending the judgment on *res judicata*, petitioners did in fact argue (as they had in the lower courts) that the Torrens Act notice requirements were constitutional, and that nothing in the Due Process Clause required Taylor to go beyond the statutory requirements to serve all county landowners. *See, e.g.*, Reply App. A at 2a-7a. The due process issue was thus not only passed upon below, but extensively argued by both parties. Respondents appear to contend that every specific argument in the petition must have been made below, but that has never been the rule; parties "are not confined here to the same arguments which were advanced in the courts below upon a Federal question there discussed." *Dewey* v. *Des Moines*, 173 U.S. 193, 198 (1899); Stern, *supra*, § 3.20, at 191. Moreover, once *Rael* was decided, and the Colorado Supreme Court had adopted its "dual standard" due process test and remanded the case for application of that standard, there was no scope thereafter for petitioners to challenge the "due diligence" prong of that standard, *cf.* Opp. 17. On the second due process issue, this Court's

3. Respondents' final argument against jurisdiction is that petitioners did not petition for certiorari on the due process questions after the Colorado Supreme Court issued its decision in *Rael* in 1994. That argument is wrong and irrelevant for multiple reasons.

First, *Rael* was not itself a final judgment on the due process question, as is required under 28 U.S.C. § 1257. Respondents rely on the fourth category of judgments identified in *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469 (1975), as final in a pragmatic sense:

> those situations where the federal issue has been finally decided in the state courts with further proceedings pending in which the party seeking review here might prevail on the merits on nonfederal grounds, thus rendering unnecessary review of the federal issue by this Court, and where reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action.

Id. at 482-83. The obvious flaw in respondents' argument is that the due process issue had not "been finally decided in the state courts" by the *Rael* decision, as *Cox* requires. *Rael* announced its novel "dual standard" for assessing the constitutionality of notice under the Due Process Clause, Pet. App. 149a, but it expressly declined to decide finally the due process issue. Rather, it held that "[t]he limited record before us discloses numerous issues of disputed fact material to the

---

jurisdiction does not turn on what cases *petitioners* cited regarding the ability of successors to real property to invoke the due process rights of prior landowners (*see id.* at 21). *Respondents* pressed the claim that they were entitled to rely on the denial of the due process rights of their predecessors-in-interest, Pet. App. 135a; the Colorado Supreme Court held in *Rael* that respondents' claims were not barred by *res judicata* if their predecessors' due process rights to notice were violated, *id.*; and then it held in *Lobato II* that the predecessors' due process rights were violated and could be asserted by their successors, *id.* at 29a. Thus, this second issue was pressed as well as passed upon below, and there is not even a colorable argument that jurisdiction is lacking in this Court.

resolution of the [respondents'] due process claim," and thus remanded the case for trial of the due process issue. *Id.* at 156a; *see also* Pet. App. 16a. The cases are legion in which this Court has held that a decision on federal law is not final when there has been a remand for trial of the federal issue. See *Urie* v. *Thompson*, 337 U.S. 163, 171-72 & n.10 (1949) (citing cases). The due process issue was not finally decided in state court until *Lobato II*, Pet. App. 29a, from which this petition was timely filed.[3]

Second, it is well settled that this Court "'ha[s] jurisdiction to consider all of the substantial federal questions determined in the earlier stages of state proceedings," regardless of whether the earlier decision on the federal matter would be considered law of the case in state court. *Hathorn* v. *Lovorn*, 457 U.S. 255, 261 (1982) (bracket omitted) (quoting *Reece* v. *Georgia*, 350 U.S. 85, 87 (1955)); *Davis* v. *O'Hara*, 266 U.S. 314, 321 (1924); Stern, *supra*, § 3.7, at 155. Respondents acknowledge this rule, but cryptically claim that this line of cases "is distinguishable," Opp. 18 n.17, without explaining how. The short answer is that it cannot be distinguished, and this Court has jurisdiction to review a ruling on a federal question whether made in the first or second appeal.

Third, the discussion of the finality of *Rael* is a red herring. Respondents do not contest the finality of *Lobato II*. See Pet. 16-17. *Lobato II* clearly decided the federal due process questions presented here (even if the standards it applied were first announced in *Rael*), and thus this Court's jurisdiction cannot be controverted. In summary, there is absolutely no

---

[3] Respondents claim that petitioners made a "tactical decision" to forgo review of the assertedly "final" judgment in *Rael*, Opp. 1, and to instead pursue its unsuccessful collateral action to enjoin the state court litigation in *Taylor* v. *Jaquez*, Civ. No. 96-Z-776 (D. Colo. Aug. 22, 1996) (abstaining under *Younger* v. *Harris*, 401 U.S. 37 (1971)), *aff'd*, 126 F.3d 1294 (10th Cir. 1997), *cert. denied*, 523 U.S. 1005 (1998). To the contrary, petitioners pursued that course because *Rael* was not a final judgment subject to this Court's review.

jurisdictional impediment to this Court's consideration of the due process questions presented.[4]

4. On the substantive question of whether review should be granted, respondents' arguments are meager. They summarily claim that the decision below is consistent with this Court's due process precedents, Opp. 23-24, but fail to address the critical point that all of those precedents address the constitutionality of state statutory notice requirements (or other state action). Pet. 18-22 & n.4. Here, the Colorado Supreme Court acknowledged that the Torrens Act notice requirements were themselves constitutional, Pet. App. 153a; under *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950), and the other precedents of this Court, that should have been the end of the inquiry. Pet. 18-22. But the Colorado Supreme Court has engrafted upon the *Mullane* test a second requirement that the Due Process Clause imposes tort-like duties upon private litigants to conform to a "reasonably prudent applicant" standard, Pet. App. 15a, resulting in the unprecedented holding that the Due Process Clause requires a quiet-title plaintiff to serve *all* county landowners if a third party suggests that they may have "potential claims" to the property, *id.* at 19a. Not only is the rule below inconsistent with this Court's precedents, and with state-action doctrine generally, but it means that quiet-title decrees will always be subject to collateral attack based on

---

[4] Respondents claim a vague right to raise future jurisdictional objections regarding parties not named respondents, Opp. i, even though every party below is a respondent in this Court whether named or not. Sup. Ct. R. 12.6. Petitioners only named in the petition those respondents expressly granted rights by the Colorado Supreme Court, Pet. 16; there was no need to seek relief against respondents whose claims were extinguished by the Colorado Supreme Court. *See* Pet. App. 25a-29a. But even if *arguendo* any unnamed respondent were planning to submit the requisite proof to the trial court of an implied easement under state law, *see id.* at 30a, any such factual determinations would not affect the finality of the judgment on the federal issues under *Cox*. Pet. 17; *Radio Station WOW, Inc.* v. *Johnson*, 326 U.S. 120, 127 (1945).

claims of inadequate conduct by a private actor. This Court should not leave in place an aberrant decision that renders title to real property insecure.

Respondents fare no better in seeking to distinguish the cases on the other side of the deep split (Pet. 24-25) on whether a landowner can assert the constitutional rights of his predecessor-in-interest. Respondents assert that in *Kemmerer Coal Co.* v. *Brigham Young University*, 723 F.2d 54 (10th Cir. 1983) and *Shelledy* v. *Lore*, 836 P.2d 786 (Utah 1992), the successor's claims were barred by the statute of limitations, whereas here they were not. Opp. 22 n.18. But the reason that the statute of limitations was applied in those cases, and not here, was that the successor in those cases was not allowed to invoke the personal constitutional rights of the prior landowner. The conflict with those courts – including the federal court of appeals with jurisdiction in Colorado – is square. Respondents point to factual distinctions between this case and *Hewitt* v. *Glaser Land & Livestock Co.*, 626 P.2d 268, 269 (Nev. 1981), but cannot show why the rule in *Hewitt* (that successors to land rights lack standing to assert the personal constitutional rights of their predecessors) turns on such facts. The Court in *United States* v. *Haddon*, 550 F.2d 677, 681 (1st Cir. 1977), disclaimed the broad rule adopted here. The ruling below that due process rights run with the land conflicts with other court decisions, allows for long-delayed collateral attacks on title, and is foreign to basic constitutional principles. It merits this Court's review.

II. RESPONDENTS' OBJECTIONS TO REVIEW OF THE FEDERAL PROPERTY LAW QUESTIONS LACK FORCE.

Respondents' claim that the second and third questions presented are not "federal questions," Opp. 24, is clearly wrong. The question of what law governs private property rights in a federal territory is a question of federal law. So too is the question of the effect of a congressional confirmation of title in fee simple absolute on property claims of third parties.

Respondents do not defend the Colorado Supreme Court's rulings on the merits, or deny that they are in stark conflict with this Court's precedents, Pet. 26-27. Rather, they claim that "the Colorado Supreme Court ruled in favor of Taylor on those issues," and simply ruled in favor of respondents on their "state law claims." Opp. 2, 7-8, 24. That is another breathtaking mischaracterization. First, respondents claimed property rights granted to the original settlers in the 1850's under *Mexican law*, acknowledging that Mexican law governed in the Colorado territory until abrogated. Reply App. B at 33a-36a & n.78. Their putative "state law claims" had nothing to do with the implied easements that the Colorado Supreme Court found to have been acquired by the original settlers in the 1850's under "United States law," Pet. App. 58a-59a; see Pet. 26-27 & nn.6, 7. Rather, respondents claimed below only that the 1863 Beaubien Document was an express grant of servitudes on the ranch property, Reply App. B at 9a-32a, and alternatively, under adverse possession, that "*as of at least 1883* (20 years after the 1863 Document was signed), and continuously since that time, Plaintiffs' predecessors have held these rights by prescription, if not under the Document," Reply App. D at 49a (emphasis added).[5] The Colorado Supreme Court's choice of governing

---

[5] Respondents' claim (again made without citing the record) that petitioners have engaged in a "stunning reversal of position" on the applicability of Mexican law, and that the court below adopted their prior position, Opp. 9 & n.11, likewise mischaracterizes the record. Petitioners never once claimed that U.S. law (and not Mexican law) governed private property rights after the 1848 Treaty and prior to the adoption of the common law in 1861. Petitioners *have* denied that the original settlers had any property rights under Mexican law because the Mexican grant created rights only in Charles Beaubien's predecessors, as the surveyor-general found in recognizing that Beaubien had absolute title to the Sangre de Cristo grant "under the laws, usages, and customs of Spain and Mexico," Pet. App. 249a. Pet. 6-7. Moreover, petitioners have argued, as respondents recognize, Opp. 10-11, that any rights such settlers may have had under Mexican law were in any event extinguished by the congressional confirmation of title in Beaubien. Reply App. C at 38a-47a.

law conflicted with the rule of this Court, and then it applied that law to recognize private property rights in conflict with other lower courts that have held such rights to be extinguished by congressional confirmations of title. Pet. 28-30. It defies belief for respondents to question the conflict here with the Tenth Circuit, which denied respondents' claims to the very same access rights on the very same property.

Respondents' call for an end to this litigation is rich with irony. This property dispute should have ended 125 years ago with *Tameling* v. *United States Freehold & Emigration Co.*, 93 U.S. 644 (1876), or at least 40 years ago when title was quieted in petitioners. The Colorado Supreme Court has reached an unjust result by distorting important principles of federal constitutional and property law and announcing rules that render title to real property insecure. Contrary to respondents' claims, the decisions below are not limited to the factual context of this case. The state court's novel "reasonably prudent applicant" prong of the federal due process standard will govern every judicial proceeding that affects property rights, and its holding that successors may assert the constitutional rights of previous landowners opens any quiet-title decree to long-delayed collateral attacks. Furthermore, its purported invocation of "United States law" to recognize common-law rights in federal territories in circumvention of congressional confirmations of title affects vast amounts of property where title derives from Mexican land grants. These distortions should be corrected, and then this case will be completed on the basis of a clear ruling by the Court that petitioners no longer face challenges to the full enjoyment of their property.

CONCLUSION

For the foregoing reasons, the petition should be granted.

Respectfully submitted,

ALBERT B. WOLF
RAYMOND P. MICKLEWRIGHT
WOLF & SLATKIN, P.C.
44 Cook Street, Suite 1000
Denver, Colorado 80206
(303) 355-2999

KEITH D. TOOLEY
KATHRYN HAIGHT
WELBORN SULLIVAN MECK &
TOOLEY, P.C.
821 17th Street, Suite 500
Denver, Colorado 80202
(303) 830-2500

CARTER G. PHILLIPS*
STEPHEN B. KINNAIRD
SIDLEY AUSTIN BROWN
& WOOD LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000

Counsel for Petitioners

* Counsel of Record

November 18, 2003

APPENDICES

APPENDIX A

SUPREME COURT, STATE OF COLORADO

Case No. 92-SC-74

COMBINED ANSWER AND OPENING BRIEF OF RESPONDENT/CROSS-PETITIONER ZACHARY TAYLOR, AS EXECUTOR OF THE ESTATE OF JACK T. TAYLOR, JR., DECEASED

APOLINAR RAEL, et al.,

Petitioners,

vs.

ZACHARY TAYLOR, as Executor of the Estate of Jack T. Taylor, Jr., Deceased,

Respondent and Cross-Petitioner.

Colorado Court of Appeals
Case No. 87 CA 0658
Opinion by JUDGE PLANK
JONES and NEY, J.J. Concurring

Appeal from the District Court of Costilla County
Max C. Wilson, District Judge
Trial Court Case No. 81 CV 5

WOLF & SLATKIN
Professional Corporation
ALBERT B. WOLF, #545
745 Ptarmigan Place
3773 Cherry Creek North Drive
Denver, CO 80209
(303) 355-2999

Attorneys for Respondent and
Cross Petitioner, Zachary
Taylor as Executor of the Estate
of Jack T. Taylor, Jr., Deceased

* * * *

[7] ARGUMENTS

I. THE NOTICE GIVEN IN THE TAYLOR TORRENS ACTION SATISFIED ALL DUE PROCESS REQUIREMENTS.

The record establishes that constitutionally sufficient notice was given in Taylor's Torrens Action. Before examining the process used to identify the individually named defendants in the Torrens Action, it is important to observe that Heirs have not challenged, and are too late to challenge the constitutionality of the Torrens Act provisions. Additionally, they make no claim that there was any lack of compliance with [8] Torrens Act notice provisions in the Torrens Action and that compliance, as well as jurisdiction over the parties and subject matter, must be presumed because the record affirmatively does not show otherwise. *See Begg v. Pile*, 153 Colo. 350, 386 P.2d 347 (1963); *Kavanagh v. Hamilton*, 53 Colo. 157, 125 P. 512 (1912); *Hughes v. Webster*, 52 Colo. 475, 122 P. 789 (1912).

The statutory method of ascertaining the parties to be named and personally served and the method provided for service upon unknown persons not only satisfies the

Constitutional requisites of the *Mullane*[8] line of authorities but appears to have succeeded in notifying the Heirs of the pendency of the Torrens Action in that they have not made any effort, anywhere, to claim otherwise. Indeed, the Colorado Torrens Act establishes a constitutionally sound method of ascertaining the parties who are and who are not to be served by publication.

A careful comparison of the facts in *Mullane* and its progeny with the process followed in the Torrens Action illustrates the important differences between the process condemned in those cases and the due diligence mandated by the Torrens Act and followed in the Torrens Action.

Mullane, *Tulsa Professional Collection Services*, *Mennonite*, *Schroeder*, *Walker* and this Court's recent *Omnibank*[9] case all have elements in common that are in sharp contrast with the procedures followed in the Torrens Action that were designed to give notice to interested parties. The procedures mandated by the Colorado Torrens Act to [9] ascertain and give notice to parties in interest were far more exhaustive and extensive than the procedures in the *Mullane* case and its progeny. The Colorado Torrens Act process imposed requirements to identify and notify parties who had interests in the subject property by not only the applicant for registration (Torrens Act 104) but also the Torrens court (Torrens Act 108, 122), a sworn court-appointed attorney title examiner (Torrens Act 113, 118), and a guardian ad litem (Torrens Act 124).

---

[8] *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950).

[9] *Mullane v. Central Hanover Bank & Trust Co.*, *supra.*; *Tulsa Professional Collection Services, Inc. v. Pope*, 485 U.S. 478 (1988); *Mennonite Board of Missions v. Adams*, 462 U.S. 791 (1983); *Schroeder v. City of New York*, 371 U.S. 208 (1962); *Walker v. City of Hutchinson*, 352 U.S. 112 (1956); and *Omnibank Iliff N.A. v. Tipton*, ___ P.2d ___, 16 BTR 984 (Colo. App. 1992) (application for cert. pending).

Following the report of the title examiner a summons is to be prepared (Torrens Act 119) in which the parties are to be designated pursuant to the following provision:

> 38-36-120. *Parties plaintiff and defendant -unknown claimants*. The applicant shall be known in the summons as the plaintiff. All persons named in the application or found by the report of the examiner as being in possession of the premises or as having of record any lien, encumbrance, right, title, or interest in the land, and all other persons designated as follows: 'All other persons or parties unknown claiming any right title, estate, lien, or interest in, to, or upon the real estate described in the application herein', shall be defendants.

Service of the summons is required to be in the manner provided for service of summons in civil actions in the district courts "...except as otherwise provided in..." the Torrens Act. The Act provides that service on non-resident defendants and unknown persons or parties "shall" be made

> ...by publishing said summons in a newspaper of general circulation printed and published in the county where the application is filed, once each week for three consecutive weeks....

Torrens Act 121.[10]

[10] Accordingly, the Torrens Action court tried the identical substantive factual and legal issues raised by Heirs in the instant action by summary judgment (Exhibit D-35) and trial proceedings, trial having lasted some eight days (Exhibit D-1). The final decree of confirmation of title and

---

[10] Judge Arraj actually ordered publication for six consecutive weeks (Exhibit D-9). That extended notice appears to have been given under the provisions of Title Act 122 allowing that "[o]ther or further notice of the application for registration may be given in such manner and to such persons as the court or any judge thereof may direct."

registration was signed on October 5, 1965 (D-1). The affect of the final decree, pursuant to Torrens Act 130 was that:

> Every decree of registration shall bind the land and quiet the title thereto, except as otherwise provided in this article, and shall be forever binding and conclusive upon all persons, whether mentioned by name in the application or included in all 'other persons or parties unknown claiming any right, title, estate, lien, or interest in, to, or upon the real estate described in the application herein', and such decree shall not be opened by reason of the absence, infancy, or other disability of any person affected thereby, nor by any proceeding at law or in equity for reversing judgments or decrees, except as especially provided in Section 38-36-131.

While rights to appeal were preserved (Torrens Act 130) in the Torrens Action, those rights were unsuccessfully exercised. *Sanchez v. Taylor*, 377 F.2d 733 (10th Cir. 1967).

Post decree relief is afforded by Torrens Act 131 allowing any person "...having an interest in or lien upon the land who has not been actually served with process or notified of the filing of the application or the pendency thereof" to appear within 90 days after entry of the decree and file a sworn answer to the application if they had no actual notice or information of the filing of the application or the pendency of the proceedings. That section also allows tort actions against applicants for fraud in procuring decrees as well as indemnity actions. Torrens Act 131(2).

No comparable provisions for identification of parties in interest, service of process or remedies are provided in the statutes condemned in the United States Supreme Court eased relied upon by Heirs and their *amici*. *Mullane*, *Walker* and *Tulsa* [11] *Professional Services* involved publication only of notices; *Mennonite* and *Omnibank* did not require written notice to mortgagees whose interests were of record, and *Schroeder* required only publication and random posting of

notices, not necessarily on the specific properties affected by the subject condemnation proceedings. None of the statutes or proceedings in the cited cases involved a court-appointed examiner of titles charged with examining title and reporting not only its status but also identifying persons who have record interests in or are in possession of the subject property, the filing of papers having the effect of lis pendens on the property; judicial involvement in the notice-giving and party identification process; a guardian ad litem[11], or a post-decree procedure allowing interested parties not served or notified to challenge the decree.

From the record it is clear that the efforts to provide notice to all persons with interests in the Mountain Tract, including the Heirs, were successful. Heirs filed 14 affidavits (Exhibits I-1, I-2, I-3, I-4 and J) in opposition to Taylor's summary judgment or judgment on the pleadings motion. Not one affiant stated that he or she was unaware of either the filing or the pendency of the Taylor Torrens Action!

Several of the Heir affiants swore that they had used the Mountain Tract for years prior to the time of Taylor's ownership and fencing in the 1960s. Several of the affidavits also stressed the purportedly adverse affect of Taylor's purchase of the Mountain Tract upon many of the people in the area. Those statements, coupled with the exhaustive arguments in the briefs of Heirs and their *amici*, is persuasive, if not conclusive evidence that every person interested in the Mountain Tract had notice and actual knowledge of the Torrens Action.

[12] In this connection, the relevant language of *Mullane* itself is instructive:

> It is true that publication traditionally has been acceptable as notification supplemental to other action

---

[11] Except *Mullane* in which the guardian ad litem himself raised the due process issues.

> which in itself may reasonably be expected to convey a warning. The ways of an owner with tangible property are such that he usually arranges means to learn of any direct attack upon his possessory or proprietary rights. Hence, libel of a ship, attachment of a chattel or entry upon real estate in the name of law may reasonably be expected to come promptly to the owner's attention. When the state within which the owner has located such property seizes it for some reason, publication or posting affords an additional measure of notification.

Taylor's unchallenged affidavit establishes that from the time of his purchase and thereafter he openly and notoriously took possession of the Mountain Tract to the total exclusion of all others except his invitees or grantees (I, pp. 265-333).

Mullane, its progeny and this Court hold that the only notice required to be given is that which is reasonably calculated to provide actual notice to parties in interest. *Ault v. Department of Revenue*, 697 P.2d 24, 27-28 (Colo. 1985). More than sufficient notice was given in the instant case.

The Colorado Torrens Act provided a legislatively established method of reasonably ascertaining the parties to be named defendants and personally served. The process looked to recorded interests, actual possession and imposed ascertainment responsibilities to ascertain parties to be individually named as defendants not only upon the applicant but also upon the court and two sworn, court-appointed officials: a title examiner and a guardian ad litem. That procedure satisfies every standard of diligent inquiry.

* * * *

APPENDIX B

SUPREME COURT, STATE OF COLORADO

---

2 E. 14th Avenue, 4th Fl.
Denver, Colorado 80203

Case No. 00 SC 527

CERTIORARI TO THE
COLORADO COURT OF APPEALS, 98CA1442
DISTRICT COURT, COSTILLA COUNTY, 81CV5

EUGENE LOBATO, et al.
Petitioners:

v.

ZACHARY TAYLOR, as executor
of the estate of Jack T. Taylor, Jr., deceased, et al.
Respondents:

Jeffrey A. Goldstein
Goldstein & Dodge
1763 Franklin St.
Denver, CO 80218
Phone: 861-8580
Fax: 861-1203
Att Reg. 4735

OPENING BRIEF

* * * *

[18] IV. ARGUMENT

A. A PROPER APPLICATION OF COLORADO LAW TO ESTABLISHED FACTS COMPELS THE CONCLUSION THAT THE 1863 BEAUBIEN DOCUMENT CREATED AND CONFIRMED RIGHTS TO USE LA SIERRA.

The court of appeals acknowledged that the Beaubien Document set forth "certain rights and privileges to be had by settlers residing in towns located within the boundaries of the Sangre de Cristo grant." *Lobato*, 13 P.3d at 829. However, the court resorted to a piecemeal application of repealed nineteenth century laws to wipe away more than a century of conduct in reliance on that Document.[15] This was a patent misapplication of Colorado law. Additionally, when the law of servitudes is properly applied in this case, it is clear that the 1863 Beaubien Document created and confirmed rights to use La Sierra.[16]

---

[15] Significantly, in the June Order, the trial court ignored Taylor's statutory argument, which had not been raised as a defense until the eve of trial. *See* June Order at V. 16, f. 5593.

[16] Plaintiffs acknowledge that the Beaubien Document expressly includes the rights of pastures, firewood and timber but does not mention hunting, fishing and recreation. The latter three rights are not included in the Beaubien Document claim but are included in both the prescription and Mexican law claims. In this brief, the full group of rights is referred to as "settlement rights," while the narrower subset of rights expressly included in the Beaubien Document is referred to as "use rights."

1. The Court of Appeals Misapplied Repealed Nineteenth Century Laws and Rules of Construction to Extinguish Rights Exercised under the Beaubien Document for More than a Century.

The court of appeals selected, in isolation, three technical provisions (two from an 1861 law,[17] and one from the common law, all expressly repealed in 1868), to invalidate the rights under the Beaubien Document. Based on these provisions, the court concluded that the Document was [19] invalid altogether as a "conveyance," *Lobato*, 13 P.3d at 831, because: (a) under the christian and surname law, the Document (i) did not give "christian and surnames" of the grantees; and (ii) did not specify the location of the servient estate;[18] and (b) ["to the extent the rights...are profits...in gross"],[19] under the common law purportedly then requiring words of inheritance, the Document failed to pass the rights to

---

[17] 1861 General Laws of Territory of Colo., Act Concerning Conveyances of Real Estate, Section 2 (hereinafter "christian and surname law"), App. 2A at 64.

[18] A close reading of this statute is warranted. The court invalidated the rights based on the first part of the referenced sentence in the statute requiring [for conveyances to bodies politic or corporate] "an accurate description of the premises", and ignored the language immediately following: "*or the interest in the premises intended to be conveyed.*" Even assuming this requirement was applicable at all, since this was not a conveyance to a body politic or corporate [or if it was, then the "christian and surname" requirement did not apply], the requirement was satisfied in this case because the Beaubien Document expressly sets forth the "interests to be conveyed" ("pastures,...firewood and timber").

[19] *See* discussion *infra* at IV,A(2)(d) at 28-32. This proposition is not even applicable since servitudes are presumed to be appurtenant, not in gross. *Passaic Valley Council, B.S.A. v. Hartwood*, 348 N.Y.S.2d 883, 885 (N.Y.Sup.Ct. 1973), *modified on other grounds*, 361 N.Y.S. 2d 945 (N.Y.App. 1974).

the successors in interest of the original grantees.[20] *Id.* While these complex legal provisions provided a convenient path for the court of appeals to escape the maze of substantive issues presented for review, application of these technical laws, without reference to, and analysis of, the entire 1863 statutory scheme, was erroneous.

a. *Technically "imperfect" documents are not void unless a statute expressly says so.*

[20] The christian and surname law (App. 2A) does not state that the failure to include the items listed renders documents *ipso facto* invalid. Absent an express provision in the statute, invalidity of a document may not be "derived from negative implication." As this Court has previously held:

> An act which provides that all deeds shall be good and valid where witnessed by two or more persons and recorded will not by implication be construed as declaring that all deeds not so witnessed and recorded shall be void.

White Cap Mining Co. v. Resurrection Mining Co., 174 P.2d 727, 730 (Colo. 1946) (citation omitted) (statute providing that assignment of certificate of purchase "shall vest" in assignee upon recording did not say that "title shall not vest until the certificate is recorded.") *Accord*, *Mulford v. Rowland*, 100 P. 603 (Colo. 1909) (statute requiring that

---

[20] This requirement of express words of inheritance (*i.e.*, "heirs and assigns") was cited by the court from *In re Newby's Estate*, 361 P.2d 622 (Colo. 1961), as being the common law. That case, however, also says that it is the common law related to devises, and suggests that lack of such words of inheritance can be overlooked if a contrary intent appeared in the will (*Id.* at 623-24) clearly mandating intervention of equity to achieve fairness. *See also*, *Trinidad v. Simpson*, 5 Colo. 65, 67-68 (Colo. 1879) (judicial notice taken that inhabitants in southern counties of Colorado were largely, *if not exclusively*, Spanish speaking around the time this Document was signed).

power of attorney "be recorded" in same office where conveyance in which power is exercised is recorded does not invalidate title under a deed where the power was not recorded, especially in light of "companion statutes" bearing thereon, which existed and had to be construed together with the statute in question.)[21]

[21] b. *The 1861 exceptions to the Statutes of Fraud compel enforcement of the Beaubien Document.*

The court of appeals failed to consider these strict 1861 conveyancing laws in *pari materia*[22] (*see e.g.*, *Rickstrew v. People*, 822 P.2d 505, 507 n.2 (Colo. 1991)) with the 1861

---

[21] In *Mulford*, this Court looked at the circumstances surrounding creation of the deed, including the *actual knowledge* of the existence of the power of attorney by the complaining party seeking invalidation. The Court stated that "*the plaintiffs case does not appeal strongly to the conscience of a chancellor*" because "[n]otwithstanding this knowledge, plaintiff received his deed, paid the purchase price, and thereby took his chances of defendant's being able to furnish, by parol evidence, proof of the execution and existence of the power of attorney whose absence from the record was the only flaw in this title. . . ." *Id.* at 184, 185. Likewise, in this case, Taylor's argument of statutory voidness "does not appeal to the conscience" because he bought this ranch, fully cognizant of the Beaubien Document and the Plaintiffs' (and their predecessors') claimed rights and proven use consistent therewith for over a century. Equity should not allow the invalidation of the 1863 Document on a technicality. *Craig v. Chandler*, 6 Colo. 543 (Colo. 1883) (strict construction of 1861 law disallowing conveyance between husband and wife was overridden by equitable considerations: "though void at law, an absolute conveyance of real or personal property (from husband to wife) is good in equity.") *Id.* at 548.

[22] *Compare* christian and surname law (App. 2A, Section 2 at 65) (no articulated consequences for failure to meet provisions) to 1861 Statutes of Fraud (*e.g.*, Sections 1, 3, 8, 12 and 17-19). which clearly instruct that if the sections are violated the offending document shall be "void." (App. 2B) Had the 1861 Territorial Legislature wanted to make documents void for the failure to meet the provisions relied upon by the court of appeals, it would have said so.

Statutes of Fraud, which were also in place in 1863, and which codified application of equitable principles to save imperfect transactions and writings.[23] As this Court has noted previously, however "laudable" were the goals of the old Statutes of Fraud adopted by English Parliament in 1677, "courts concerned about the inequitable results...began to develop such doctrines as equitable estoppel and part performance to prevent the defense from becoming itself a means to perpetrate fraud." *Kiely v. St. Germain*, 670 P.2d 764, 768 (Colo. 1983) (promissory estoppel claim upheld without a writing). In this case, more than a century of performance must override these archaic laws.

c. *The laws were repealed and the savings clause does not apply to save the common law.*

[22] The 1861 laws were expressly repealed in 1868.[24] Reviving these laws now to extinguish rights that were

---

[23] Section 10 of the Act Concerning Fraudulent Conveyances and Contracts Relative to Real and Personal Property ("1861 Statutes of Fraud"), specifically empowered "courts of equity to compel the specific performance of agreements, in cases of part performance of such agreement." (App. 2B at 244). This Statutes of Fraud exception remains unchanged today. C.R.S. § 38-10-110. The Statutes of Fraud should not be allowed to operate as a cloak for, rather than a shield against, fraud. *Burnford v. Blanning*, 540 P.2d 337 (Colo. 1975). Here, permitting these 1861 statutes to defeat Plaintiffs' rights would perpetrate such an injustice for Taylor.

[24] 1868 Colo. Terr.L.Cb.XVII, sec. 7 and endnote, page 115 (App. 3 at 107 and 115; App. 4 at 683). The savings clause was only and improperly used by the court of appeals to "save" the common law rule on words of inheritance. *Lobato* at 831. *See e.g.*, *Schuler v. Henry*, 94 P. 360 (Colo. 1908) (denying alleged rights under abrogated common law of coverture since "where the reason, which is the spirit and soul of the law, fails the [common] law fails." *Id.* at 363.) The court of appeals significantly (and appropriately) did not address or "save" the 1861 christian and surname law, Section 2, from its express repeal. *Lobato* at 831. And a repealed

unchallenged and exercised for generations after repeal is contrary to any proper statutory interpretation.[25] The court of appeals turned the law on its head to "save" repealed laws for *ex post facto* application to re-write more than 100 years of Colorado history.

d. *The right to invoke these newly raised defenses has long ago been lost.*

The court of appeals acknowledged that the rights under the Beaubien Document were exercised for more than a century. *Lobato*, 13 P.3d at 825. There is *no* evidence that during that period Taylor's predecessors in title, including Taylor in the Torrens action, *ever* raised alleged defects under 1861 laws as a defense to those rights. Indeed, Taylor did not raise this defense in this litigation for more than seventeen years until the eve of trial, and the trial court disregarded it entirely in its ruling. The court of appeals' decision turns on a technical defense that was long ago lost under a litany of applicable grounds, including statutes of limitation, laches, waiver and estoppel.

2. The Law of Servitudes Properly Applied to the Facts of this Case Establishes That the Beaubien Document Created and Confirmed Plaintiffs' Rights to Use La Sierra.

[23] Although the court of appeals largely skirted the merits of the Beaubien Document claim by application of nineteenth century law addressed above, the court further erred in concluding that the use rights should not be treated as other servitudes under Colorado law. This Court should properly apply servitude law to the facts of this case – including the uninterrupted exercise of the use rights for more than a

---

law is deemed as though it never existed. *Hirschburg v. The People*, 6 Colo. 145, 147 (Colo. 1881).

[25] *See e.g., Petition of S.O.*, 795 P.2d 254, 258 (Colo. 1990) (just and reasonable result presumed from statute and absurd result to be avoided).

century based on the original parties' and their successors' interpretation and understanding of the Beaubien Document – and conclude that the use rights on La Sierra were created and confirmed in the Beaubien Document.

a. *The use rights are "servitudes."*

The use rights are "profits a prendre." These interests, now known as profits, along with easements and covenants, are all termed "servitudes."[26] Contrary to the lower courts' conclusion that profits and easements are not treated identically for all purposes, *Lobato*, 13 P.3d at 827, and as even Taylor conceded before trial (V. 13, f. 4000), profits, including profits a prendre, are labeled and treated in the law as "easements" since "in no case [is] there a rule applicable to one of these interests which [is] not also applicable to the other." Restatement (First) of Property § 450 Special note (1944). And "generally, ***the rules governing creation. interpretation, transfer and termination of easements and profits are the same***[27] in American law." (Restatement § 1.2

---

[26] *See* Restatement (Third) of Property (Servitudes) § 2.2, comment (d) (2000), "Although labels are not determinative, the terms "easement," "profit," "covenant" and "servitude" normally indicate that a servitude is intended." (Hereinafter Restatement Third will be known as the "Restatement".) "Profits a prendre" are now known simply as "profits." Restatement § 1.2, comment (f) at 16.

[27] *See Hottell v. Farmer's Protective Association*, 53 P. 327 (Colo. 1898) (mixing the terms "covenant" and "easement" interchangeably and describing the right to use water and machinery on another's land as "an easement, or something in the nature of an easement." *Id.* at 330. *See also*, *Gerhard v. Stephens*, 442 P.2d 692, 706 (Cal. 1968) ("for purposes of the issue [of whether the interest can be abandoned,] easements and profits a prendre are indistinguishable"); *Gray v. Handy*, 208 N.E.2d 829, 832 (Mass. 1965) (an appurtenant profit is "in all respects, except the character of the user, of the same nature as an easement"); *Willamette Quarries, Inc. v. Wodtli*, 761 P.2d 1356, 1360 (Ore. App.1988), *aff'd*, 308 Ore. 406, 781 P.2d 1196 (Ore. 1989) ("profit a prendre...similar to and subject to the same rules as easements").

comment (e) [24] (*emphasis supplied*).[28]) *Accord, Figluizzi v. Carcajou Shooting Club*, 516 N.W.2d 410 (Wis. 1994)

Although the complexity of this subject of servitudes seems to have stymied the lower courts, between reference to the simplified Restatement principles and long-standing Colorado law, the analysis of this subject now is considerably easier. The law has not changed, it has just been streamlined for ease of application.

Both the *creation* and *interpretation* of the servitudes in the instant case thus must be analyzed using the law of easements and servitudes.[29] And since the servitudes themselves (the "benefits" of "pastures, firewood and timber") were expressly written down in this Document, the issue of their "creation" should not be confused with the issue of their location for exercise – La [25] Sierra. Since both lower courts concluded that profits were not granted (or "created") by the Document,

---

[28] In *Lazy Dog Ranch v. Telluray Ranch Corp.*, 965 P.2d 1229 (Colo. 1998), this Court also analyzed easements as servitudes, relying extensively upon approved portions of the then-tentative draft of Restatement (Third) of Property (Servitudes). That entire Restatement has now been formally adopted and published. As the commentators observe: "This Restatement presents a comprehensive modern treatment of the law of servitudes that substantially simplifies and clarifies *one of the most complex and archaic bodies of 20th century American law*.... It is designed to allow both traditional and innovative land-development practices using servitudes, without imposing artificial constraints as to form or arbitrary limitations as to substance." Restatement, Introduction, p. 3 (*emphasis supplied*).

[29] The distinction between "creation" and "interpretation" of servitudes is important. See Restatement (Chapter 2 covers creation; Chapter 4 is interpretation). Although the court of appeals recites from Tiffany and Thompson (real property treatises) for general propositions on how the *nature* of profits and easements vary slightly (*Lobato* at 826-27, 833), neither of these treatises supports the proposition that the law used *to interpret* the two types of interests is different. The only case cited was *Alexander Dawson v. Fling*, which both lower courts completely misapplied. *See* discussion infra at IV, A, 2(e).

that issue first will be addressed. Then, using servitude principles, Plaintiffs will show that the Document should be interpreted to confirm that La Sierra was the intended location for the rights to be used.

b. *While not perfectly stated, the servitudes were created and enforceable.*

Contrary to the conclusions of the lower courts, even without words of "grant" or strict compliance with ancient statutes,[30] the Beaubien Document *created* use rights servitudes. Servitudes may be *created*: (a) by express conveyance; (b) by implication (including by pre-existing use or by demonstration of general development plan); and (c) by prescription. *Lazy Dog Ranch*, 965 P.2d at 1234. Magic words, including those of express grant,[31] are not required to create a servitude since "[t]he intent to create a servitude may be express or implied. *No particular form of expression is required....*" Restatement § 2.2. (*emphasis supplied*). *See also, Hamilton v. Ertl*, 360 P.2d 660, 663 (Colo1961).

Pertinent to this case, the Restatement commentators explain:

> people sometimes fail to articulate their understandings in words, and even when they use words, they may fail to express their intentions unambiguously. *To avoid unfairness*, American courts generally seek to ascertain and give effect to the intentions of the parties, even though imperfectly expressed.... *The old insistence on use of particular words of grant [and] words of inheritance...have almost totally disappeared from modern law.*

---

[30] As a non-possessory interest in land, an easement does not require the precise description that a possessory interest [fee title] does. *Hutson v. Agricultural Ditch & Reservoir Co.*, 723 P.2d 736, 739 (Colo. 1986).

[31] *Thompson v. Finnerud*, 212 N.W. 497 (S.D. 1927) (hunting rights were servitudes for which no word of "grant" was necessary).

[26] *Id.* at Section 2.2, comments (a) and (d) at pp. 62-63 (*emphasis supplied*). *See also, Scott v. Brown*, 206 P. 572, 573 (Colo. 1922).

Simply stated, failure to use express words of grant, technical legal conveyance form or words, or even a clear definition of the servient estate to be burdened does not void the *creation* of a servitude,[32] *especially if it otherwise is enforceable in equity*. Moreover, to void the heart of the written, signed and recorded Document which explicitly names these privileges allows Taylor to be unjustly enriched by terminating these long-standing rights on a technicality. *See e.g., Ralston Oil and Gas Co. v. July Corp.*, 719 P2d 334, 339 (Colo. App. 1985) (constructive trust imposed to enforce oral agreement to convey lease).

c. *The servitudes were relied upon and performed.*

Part performance under the Document removes the bar of the Statute of Frauds and compels its enforcement.[33] An 1863

---

[32] Even without express words of "grant," the Torrens judge construed the Beaubien Document as creating a "grant" to the vega, another piece of land covered in the Document (V. 3, ff. 379-381). *See Lazy Dog Ranch*, 965 P.2d at 1234; *Bromley v. Lambert and Son, Inc.*, 752 P.2d 595 (Colo. App. 1988); *Proper v. Greager*, 827 P.2d 591 (Colo. App. 1992) (implied by pre-existing use); *Taylor v. Melton*, 274 P.2d 977, 981 (Colo. 1954), and Restatement § 2.14 (implied by general development plan). *See also* Restatement § 4.2 (omitted terms of a servitude may be supplied by the court).

[33] C.R.S. § 38-10-110 (identical to the 1861 law). The rules may be stated slightly differently for interpreting a servitude which has been imperfectly documented (Restatement, § 2.8, comment (c) at 133), and an oral servitude for which there is no documentation. (*Id.* at comment (b)) Whichever approach is used, the result is the same, since the servitude, oral or imperfectly written, must be given effect in accordance with the intent of the parties, and such things as maps, testimony, and *subsequent actions of the parties*. (*Id.* comment (c)) It would be ironic and inequitable if this court struck down these servitudes because of failure to comply with strict formalities, when, if they had never been written at all,

eyewitness gave testimony that Beaubien delivered his Document to [27] inhabitants at the Plaza of San Luis in May 1863.[34] The Document was then recorded. Immediately following the delivery of the Document, Beaubien conveyed to settlers their vara strips of land, consideration was paid therefor,[35] and the settlers stayed in the area and raised their families. New settlers moved here and bought land. Then the Plaintiffs' predecessors and Plaintiffs themselves exercised the use rights (which were necessary to their continued survival), consistent with the terms of the Document and their claims for almost 100 years thereafter. *Lobato*, 13 P.3d at 825. If, as here, the beneficiaries of the servitudes have justifiably relied upon the existence of the servitudes and changed their positions thereon, and if injustice can only be avoided by giving effect to the *parties' intent to create servitudes*, then any failure to comply with the Statutes of Fraud does not apply (Restatement § 2.9 at 134) and Taylor is

---

they could have been implied from surrounding circumstances. The Restatement makes all of these factors important, whether written or oral, in trying to ascertain the intent of the parties. *Id. See Gyra v. Windler*, 91 P. 36, 39 (Colo. 1907) (under principle of estoppel, part performance of an oral license of right of way takes the place of a writing and takes it out of Statutes of Fraud).

[34] App. 5, pl. ex.16, the "Gaspar Interrogatories." J.L.Gaspar was one of the two witnesses to the Beaubien Document, who later became attorney-in-fact for Beaubien in San Luis. App. 6, see highlighted entry. In 1916, he testified about the Document by way of interrogatories in a lawsuit concerning settlers' claims to title to their properties under Beaubien deeds to them (which Gaspar had executed under power of attorney). These interrogatories, which the lower courts apparently ignored, provide a key first-hand account of Beaubien's intentions in executing this Document.

[35] *See* App. 6 (V. 52, pl. ex. 262), several pages from the Grantor-Grantee Index [grantors with name beginning with "B"] for Books 1-4 of the Costilla County Land Records, listing the deeds from Beaubien after May 1863.

estopped to deny the validity of the servitudes. *Kiely v. St. German*, 670 P.2d at 768.[36]

[28] Once *creation* of the servitudes is found, this Court must then *interpret* the servitudes. If complete guidance is not found in the Document itself, the law provides rules for documentary construction. *See e.g.*, *Lazy Dog Ranch*, 965 P.2d at 1235 (stressing need for context-based inquiry, paramount concern in construing a servitude should be to ascertain intent of parties from circumstances surrounding transaction, even when document is silent as to a right).[37] *Hottell v. Farmers Protective Association*, 53 P. at 327; *Gjovig v. Spino*, 701 P.2d 1267, 1268 (Colo. App. 1985) (historical use should determine location).

---

[36] This court has enforced (even oral) contracts to convey *fee title* to real estate, with part performance. *Ridgeway v. Pope*, 430 P.2d 77 (Colo. 1977); *see also*, Restatement of Contracts (Second), § 129 at 321 (contracts exception to Statutes of Fraud) and C.R.S. § 38-10-108 (only a note or memorandum signed by party to be bound is required for contract to sell land.

[37] This Court also noted that servitudes are properly interpreted using contract law. *Id.* at 1235. Other applicable rules of construction include: (1) construction should favor the grantee (*Isenberg v. Woitchek*, 356 P.2d 904, 907 (Colo. 1960) (concerning an easement) and *Clevenger v. Continental Oil Co.*, 369 P.2d 550, 552 (Colo. 1962)); (2) provisions should be construed as operative, rather than viewing clauses in isolation (*Percifield v. Rosa*, 220 P.2d 546, 551 (Colo. 1950)); (3) if a contrary interpretation would make a provision meaningless, an instrument involving property rights should be construed as valid (*Oken v. Hammer*, 791 P.2d 9, 12 (Colo. App. 1990)); (4) court should follow the construction placed on a document by the parties (*Buckhorn Plaster v. Consolidated Plaster Co.*, 108 P. 27, 33 (Colo. 1910)); (5) instrument will not be construed as a nullity if any other reasonable construction will void that result (*Clark v. Bouler's Estate*, 163 P. 965, 966 (Colo. 1917)); and (6) instrument presumed valid (*Quimby v. Boyd*, 6 P. 462 (Colo. 1885)).

d. *The servitudes are appurtenant and not "in gross."*

The court of appeals concluded that "if" the rights claimed were profits "in gross," that the interests failed for two reasons: (a) they were incorrectly "conveyed" under the 1861 common law, *Lobato*, 13 P.3d at 831; and (b) as profits in gross, they could not be implied in Colorado. *Id.* at 832-33.[38] This Court must address this issue of "in gross" versus "appurtenant," and recognize the very [29] strong presumption[39] and policy reasons for appurtenance. Clearly, the analysis depends upon the facts. In this case, the trial court's findings support the conclusion of appurtenance. Once appurtenance is determined, all of the court of appeals' conclusions tied to this undecided premise ["*if* the profits were in gross"] therefore must fail.[40]

As this Court said in *Lazy Dog*, "an easement is deemed to be appurtenant when the benefit .... 'runs with' an interest in property. Owners of the property are entitled to the benefit....

---

[38] Once again, this illustrates the confusion of the courts between creation of the profits (which were named in the Document) and interpretation of the Document itself

[39] This presumption of appurtenance has long been a part of American law. *Passaic Valley Boy Scouts v. Hartwood*, 348 N.Y.S. 2d at 888, *supra*. *Osterberg v. Goodkin, 2000 Wash. App. Lexis 72. (Wash. Ann. 2000)* and *Tennessee v. Yarbro*, 1984 Tenn. App. Lexis 2762 (Tenn. App. 1984) (applied the presumption to grazing rights, saying that rights (as profits) on the small (dominant) strips of land would hardly be valuable without the larger area on which to graze). *See also Chase v. Cram*, 97 A. 481, 484 (R.I.1916) which cites, at 483, many old cases recognizing the presumption, including *Bingham v. Salene*, 14 P. 523, 525 (Ore. 1887) (profit to hunt waterfowl is deemed as a easement appurtenant if enjoyed in connection with the certain land).

[40] The court of appeals never legally analyzed, or reached a conclusion as to, appurtenance, but its analyses throughout, and the court's conclusions, contrary to the presumption, were based on the premise that the profits were "in gross."

due to their relation to the property." 965 P.2d at 1234. As *Lazy Dog* also notes, section 4.5 of the Restatement provides extensive guidance on this issue. *Id. See also, Westland Nursing Home v. Benson*, 517 P.2d 862, 865 (Colo. App. 1974) (to resolve this issue, examine document, intent of parties and surrounding circumstances).[41]

In this case, the issue is whether the *benefits* of the servitudes (to Plaintiffs) are appurtenant or in gross. Generally stated, "the benefit of a servitude is appurtenant to an interest in property if [30] it serves a purpose that would be more useful to a successor to a property interest[42] held by the original beneficiary of the servitude at the time the servitude was created than it would be to the original beneficiary after transfer of that interest to a successor. *In cases of doubt, a benefit should be construed to be appurtenant rather than in gross.*" Restatement § 4.5(a) at 540 (*emphasis supplied*). The sound policy reason for this presumption is that holders of appurtenant benefits then can be located through land and tax assessment records.[43] *Id.*, comment (d) at 542.

---

[41] A covenant (servitude) "runs with the land" if it "closely relate[s] to the land, its use, or its enjoyment". *Cloud v. Association of Owners, Satellite Apt. Inc.*, 857 P.2d 435, 440 (Colo. App. 1992). *See also Williams v. Stirling*, 583 P.2d 290 (Colo. App. 1978) (easement appurtenant to use ski easement implied as "equitable trust" for dominant estate not specifically named).

[42] The commentators note that this means either ownership or occupancy of land. *Id.*, comment (d) at 541.

[43] Plaintiffs made this argument in the due process phase of the case, urging that their interests were based on their property ownership, not their use, and that based on the assessor's rolls, they should and could have been "reasonably identifiable" to Taylor in his 1960 Torrens action (in accordance with the test of this court developed in *Rael v. Taylor*, 876 P.2d 1210 (Colo. 1994)). The trial court instead identified only which Plaintiffs (or predecessors) were able to prove they were openly *using* the rights in 1960, and dismissed the claims of all other landowners from this suit who could not prove that "use." Plaintiffs submit that a conclusion of

The court of appeals observed that the Document set forth "certain rights and privileges to be had by settlers *residing* in towns located within the boundaries of the [Sangre de Cristo] grant." *Lobato*, 13 P.3d at 829 (emphasis supplied). The trial court found that: (a) the sheep ranchers could not have survived without use of the mountains east of their home place (June Order at 6-7; V. 16, ff.5598-89) and observed that (b) the Plaintiffs and their predecessors *in title* had the rights under the Document. *Id.*; V. 27, tr. 1606:6-7 and 12-13, tr. 1612:14-20. The Gaspar Interrogatories are the best evidence of Beaubien's intentions when he signed the Document. Gaspar, who was there in 1863 with Beaubien, stated:

> [The rights...granted [in the Document] were for "the full protection of all of the people of those *town[s] and settlements* [mentioned in the Document]...and *also* to [31] prescribe certain regulations for the people... ."[44] [Beaubien] stated that it was his voluntary act for the use and protection of those people who had settled on his lands in the towns and settlements mentioned in the Deed [Document], as well as for the protection of others who might settle in such towns and settlements."

App. 5 at 2 (emphasis supplied).

Clearly, as Beaubien recognized at the time, the "rights therein granted" were to benefit the people who lived on the land, whether they lived there in 1863, *or came later*. These use rights were intended by Beaubien to be appurtenant to the "towns and settlements" named in the Document, and Beaubien even said so to Gaspar. Under the circumstances of

---

appurtenance by this Court will affirm this policy and make it easier (and more certain) in the future to quiet title to (and against) servitude claims.

[44] These comments are very significant for two reasons. First, these were not just "regulations," as the trial court found. There were also rights granted. And second, the "towns and settlements" mentioned in the Document were clearly the intended "dominant estates." This factor was confirmed by both lower courts.

this case, a construction of appurtenance is favored and would promote sound policy.[45]

Assuming the servitudes are deemed appurtenant, the general rule is that they automatically transfer with the benefited property, as appurtenances, without need of further express conveyance or mention. *Westland Nursing Homes*, 517 P.2d at 865; Restatement §§ 1.1(1)(a) and 4.6 (1)(a).[46] Further, because the rights are appurtenant to property, and not "attached" to the person (or "in gross" as the court of appeals intimated but refused to decide), lack of words of inheritance allegedly [32] required by the common law in 1863 is of no consequence to defeat attachment of the servitudes to Plaintiffs' lands today.[47]

---

[45] The unique facts and history of this case, the circumstances surrounding execution of the Document, and 100 years of performance clearly support the conclusion that the land occupancy in this area and the exercise of the rights by the occupants were inextricably intertwined, and critical for survival, as the trial court noted. This was not like a modern leisure hunting or fishing license, which might more typically transfer from person to person.

[46] The fact that documents in Plaintiffs' or Taylor's chains of title may not make reference to the use rights claimed also is of no legal effect. *Estate of Seeger v. Puckett*, 171 P.2d 415, 416 (Colo. 1946) ("immaterial that the restrictions were not in [the] deed," especially in light of the fact that defendants clearly knew about the claimed rights when they took title.) *See also*, *Pagel v. Gisi*, 286 P.2d 636, 638 (Colo. 1955).

[47] The court of appeals stated that this common law rule requiring "words of inheritance" only applied "to the extent the rights purportedly granted in the Beaubien Document [were] profits a prendre in gross." (*Lobato* at 831) But even if this Court were to hold that the rights were "in gross." Plaintiffs urge that the common law rule, which was expressly repealed in 1868, still is not applicable. *See* Section IV A,1, (c), *supra* at 21-22.

e. *The servitudes burden Taylor Ranch lands by clear implication.*

The court of appeals misinterpreted Plaintiffs' principal argument concerning the Document, summarizing it as follows: " [Plaintiffs] argue ... that the *rights* which Beaubien intended to convey *may be inferred* from evidence of the use to which the subject property was put ... for nearly 100 years". *Lobato*, 13 P.3d at 832 (*emphasis supplied*). Rather than seeking inference of the rights themselves, which were explicitly named in the Document ("pastures, firewood and timber"), the Plaintiffs sought implication, by the 100 years of use, of their *location for exercise*.

The court of appeals erroneously refused to imply the *location* of the servitudes by then misapplying the holding in *Alexander Dawson v. Fling*, 396 P.2d 599 (Colo. 1964). That case does not say that the *location* of profits may not be implied. Rather, because in that case the profits ("boating and swimming") were "expressly" named in the document being examined, the court declined to create by implication *an additional right* of "fishing" (which was nowhere named). In the *Fling* case, the issue was whether the *existence* of the right (profit) itself could be implied when not "expressly named."[48] It was not, as Plaintiffs urge here, that such interpretive factors as their [33] location, extent or use could be implied as this court sanctioned in *Lazy Dog*. 965 P.2d at 1229 (issue of use of easement was distinct from its existence, scope and width).[49]

---

[48] The court of appeals' error in misinterpreting the *Fling* case formed the sole basis for not examining Plaintiffs' claims that the location of the servitude burdens could be implied. "In light of *Fling*, the trial court properly rejected Plaintiffs' arguments that it should find profits a prendre by implication." (*Lobato* at 833)

[49] This Court also noted that the Restatement interpretation default rules found in Chapter 4 can be used to supply necessary terms to an easement. *Id.* at 1237. Plaintiffs urge that upon application of these default rules, these servitudes must be upheld as created, appurtenant to the Plaintiffs'

The trial court improperly concluded that because La Sierra (Taylor Ranch) land was not specifically named in the Document, it could not be burdened by the servitude.[50] However, given the court's findings that the Taylor Ranch was the actual use location for the use rights for almost 100 years, the servient estate should be implied, by application of servitude principles.[51] "[E]quity looks at the substance and reality of a transaction and not its form.[52] Since the court's findings point [34] like a beacon directly to the Taylor Ranch,

---

lands, and exercisable in La Sierra. Restatement § 4.2 (supplemental terms may be supplied by the court).

[50] Ironically, the trial court found the Document was not patently ambiguous for purposes of locating the servitudes (June Order, V. 16, f. 5596), and refused to admit or consider most extrinsic evidence on this issue. However, on the issue of whether the Document itself created servitudes, the court heavily relied on the extrinsic evidence of the Fort Garland Lease, in which Beaubien "granted" the "privileges...of pastures, firewood and timber," to defeat the Plaintiffs' servitudes (June Order, f. 5595). This Document and its words should be construed (among other factors) by looking to the vernacular used at the time, and to what meaning the landowners at the time, and the "commercial world", attached to it. *See Farrell v. Sayre*, 270 P.2d 190, 193 (Colo. 1954) (referring to interpretation of the word "minerals" by the mining world and parties at the time). Both lower courts in this case also failed to follow the *Lazy Dog* case mandating admission and consideration of significant extrinsic evidence to help interpret the Document. *See e.g.*, V. 17, ff. 5617-5693 (Plaintiff's Offer of Proof).

[51] "[Since] transactions are not always handled properly, and to avoid unfairness, *courts may infer* the identity of the parties or *properties intended to be* benefitted or *burdened* by a servitude." Restatement § 2.11, comment (b) (*emphasis supplied*). *See also* Restatement (First) of Property § 539 and Restatement § 2.12 (servitudes implied by pre-existing use) and § 2.14 (implied by a general development plan), and § 4.2 (omitted terms may be supplied).

[52] *Wilson v. Goldman*, 699 P.2d 420, 426 (Colo. App. 1985) (fishing rights "retained" by grantor for use of association property owners were "granted" rights (despite no words of grant), which benefitted grantors' members and lot owners in other subdivisions later developed by grantor.) *Id.* at 423.

consistent with and since execution of the Document, the court erroneously refused to imply that the Taylor Ranch was the intended servient estate.

f. *The Document stated Beaubien's plan for development which mandates implication of the servitude burden on the Taylor Ranch.*

The Document was Beaubien's 1863 master land plan[53] for the settlement of the Culebra River Drainage and surrounding area. The Document contained the servitudes which were to benefit "all the inhabitants" of the places named (*i.e.*, the dominant estates).[54] The Document was "created for the

---

[53] The trial court found that Carlos Beaubien "was a developer, land seller and profiteer who...had the right to do with the land as he wished." (June Order, V. 16, f.5599) What Beaubien "wished" was written in, and implied from, the Document, read in the context of the times, and confirmed by his actions of conveying properties, consistent with the Document, immediately thereafter. (*See* App. 6, Ex. 262, Index to Book 1 in the Costilla County Land Records). Included in the indexed documents, immediately before and after the Beaubien Document entry were (see highlighting) Beaubien's deed to the Millsite (June 1, 1863 Deed to St. Vrain and Easterday), and deed to the townsite [People] of San Luis (entry at Book 1, page 220) (both mentioned in the 1863 Document), and several hundred deeds from Beaubien to the Spanish settlers for their "vara"strips from which these owners then exercised the conveyed use rights, and lived "*by a convenient arrangement always taking care not to interfere with the rights of others.*" (App. A-1 and Ex. 259(a)) This was Colorado's earliest planned community (San Luis is Colorado's oldest town), complete with "community" requirements that were appropriate and customary at that time, and necessary for 1860's frontier life. Today, a homeowners association is formed to oversee and administer the "convenient arrangement" of a planned community (pools, courts, etc.). In 1863, people observed Beaubien's stated plan (and admonitions) cooperatively – at least until 1960 when Mr. Taylor came to town and stopped observing the covenants.

[54] *Lobato* at 829; *see also*, Gaspar Interrogatories, App.5. The trial court agreed that the people who lived in the places named in the Document had the rights under the Document ("agreement"). (V. 27, tr.

benefit of the people who acquired title." (V. 27, tr.1646:12-14) And since the burdened or [35] servient estate is not identified in the Document, the law directs that tools for servitude interpretation be used. These include identifying the intentions or reasonable expectations of the parties in light of all the circumstances:

> Circumstances relevant to interpreting the language of a servitude include the "location and character of the properties burdened and benefitted by the servitude, *the use made of the property before and after creation of the servitude, the character of the surrounding area*,[55] the existence and contours of *any general plan of development* for the area and consideration paid for the servitude."

Lazy Dog Ranch, 965 P.2d at 1237 (*emphasis supplied*).

The use made *after* the Document was executed is strong circumstantial evidence of what was intended and is relevant for interpretation of the Document. *Id.* Location of an easement may be determined by the practical location in use by grantee acquiesced in by grantor at the time of the grant and for a long time thereafter. *Isenberg v. Woitchek*, 356 P.2d 904, 907 (Colo. 1960); *see also*, Restatement § 4.8, comment c at 560. Certainly 100 years of continued use on the Taylor Ranch lands is the best evidence of such "practical location" by the parties and their predecessors.

1606:6-7 and 12-13; tr. 1612:14-20; June Order, V. 16, f. 5598-99). However, when the court learned that none of these locations was on the Taylor Ranch (June Order), the court effectively refused all attempts to show that these named locations described the *dominant estate* benefitted, not the servient estate as the court apparently concluded. (V. 27, tr. 1606:3-1610:16)

[55] In all contracts are conditions superinduced by the "pre-existing law" of nature, of nations, or of the community to which the parties belong. They are always presumed...to be known and recognized by all... ." *De Graffenried v. Savage*, 47 P. 902, 904 (Colo. 1897).

The trial court also made findings about "the character of the properties benefitted and burdened.... [and] of the surrounding area and the existence of any general development plan of the area" (all *Lazy Dog Ranch* factors for interpreting servitudes. *Id.* at 1237). With respect to these factors, the trial court found: (1) the original settlers could not survive as sheep ranchers without the use of the mountain area east of the home place;[56] (2) Beaubien executed the 1856 Ft. Garland Lease [36] (in which Beaubien created identical use rights of "pastures ... timber and firewood");[57] (3) the claims of title of all Plaintiffs and Taylor ran back to Beaubien;[58] and (4) Taylor's land remained unfenced for 97 years.[59] *Lobato*, 13 P.3d at 830, citing to the findings.

---

[56] See map attached as Exhibit A to Taylor's Deed (V. 41, pl. ex. 23) clearly showing the location of La Sierra directly east of all the towns mentioned in the Document.

[57] Thus, such use rights were already recognized by both Beaubien and by those occupying the area - in this case, the U.S. Army - as critical to sustain life. The use rights were essential to successful settlement on the Mexican frontier. Plaintiffs' expert, Dr. Montoya, so testified. (V. 28, tr. 1842:12-20, tr. 1843:15-23) Curiously, the court found that because this Lease (V. 52, pl. ex. 258) contained the words, "on lands owned by us," it demonstrated that Beaubien knew how to "convey" such rights, but did not do it in the Beaubien Document. Clearly, Beaubien could not have created the use rights on any properties other than lands "owned by him." Taken in the context of the times, consideration of this lease is helpful in confirming Beaubien's intent to provide these rights in the totality of the circumstances surrounding execution of the Document.

[58] This fact supports the "general development plan" and also provides an important element of proof for servitudes implied by pre-existing use. There was a common grantor of the dominant and servient estates.

[59] Here, plaintiffs seek implication of the location of the servient estate from the general development plan. However, it was not surprising that the land remained unfenced and was considered "open range." Since even "ranch managers" on this land acknowledged the grazing and managed the herd flow (June Order, Finding 10, V. 16, f. 5595), this finding is consistent with evidence that Taylor's property was used by Plaintiffs and

That Beaubien had a general plan of development in 1863 is evident from reading the 1863 Document. Colorado recognizes servitudes implied from such a general plan of development:[60]

> [37] They have been imposed by a common vendor or the original owners of a tract of land, in pursuance of a general plan for development and improvements of the property by laying it out in streets, avenues and lots, adopting some uniform or settled building scheme. The restrictions generally relate to number, location, size, or style of buildings to be erected, *or to the uses to which such buildings or land may be put*.

Taylor v. Melton, 274 P.2d 977, 981 (Colo. 1954) (*emphasis supplied*).[61]

---

their predecessors after execution of the Document. And had the property been fenced off, it would have been an improper interference with the Plaintiffs' servitude rights. After Taylor did so interfere, Plaintiffs brought this lawsuit.

[60] Plaintiffs urge that these rules permitting servitudes to be *created* by implication are equally (or more) applicable to assist this Court in interpreting the created servitudes, including supplying unstated terms, like the location for exercise. Restatement § 4.2. By the trial court's findings (June Order Finding 2, R. 5594), *a servitude by pre-existing use* is quite similar and alternatively could be implied from the court's findings. (*See also*, Restatement § 2.12) It requires original unity of title in a common grantor (and subsequent separation of title), obvious benefit to the dominant estate (*i.e.*, here, the settlers' lands), and burden to the servient estate which existed at the time of conveyance, evidence that the common owners used the property in its altered (*i.e.*, with use of the use rights), condition long enough before conveyance to show that the change was intended to be permanent, and necessity for the easement (use rights) at the time of severance (*i.e.*, in 1863, not necessarily today). *Proper v. Greager*, 827 P.2d at 593-594. *See* Restatement § 2.14 (developer imposing a servitude on land creates an implied reciprocal servitude burdening *all the developer's remaining land included in the general plan*, if injustice can be avoided only by implying the reciprocal servitude).

[61] As the *Taylor* court further observed: "The intent of the grantor is the determining factor... . The uniformity of the restrictions, reliance by the

Not only did Plaintiffs and Taylor have a common grantor, but the conduct of this "developer and land seller," Beaubien, was clearly to provide the needed resources, rules, benefits, and covenants for the land owners-settlers in furtherance of his general plan of development.[62] As in any covenant dispute, once one successor to the covenants (here Taylor) refuses to be bound by the covenants, the other successor to the original developer (here the Plaintiffs) has a claim to enforce the covenants in equity.[63] By the filing of this action, that is precisely what Plaintiffs, as successors to the covenanted property, did to enforce their use rights servitudes on the Taylor Ranch.

Finally, knowledge of the implied burden by the owner of the servient estate is a significant factor used in determining whether the land was intended to be, and in equity should be, burdened [38] by the servitude claims.[64] In this case, the trial court found that from 1863 through 1960, Taylor and his predecessors not only knew of the use and never denied it (June Order, f. 5594), but ranch managers helped "direct flocks of sheep to specific locations. . . ."[65] (June Order,

---

buyers, actual *development of the tract* and erection of [dwelling houses free from business buildings] are all considered in determining the existence of the plan. *Id.* (*emphasis supplied*)."

[62] The Gaspar Interrogatories clearly establish from an eyewitness that Beaubien intended and wanted to provide these things (App. 5); this flatly contradicts the trial court's suggestion that since Beaubien could "do with the land as he wished" (V. 16, f. 5599), that he did not intend to create the rights on his land.

[63] *Taylor v. Melton*, 274 P.2d at 981; *Wilson v. Goldman*, 699 P.2d 420; *See* Restatement § 1.1(2) (covenants are servitudes).

[64] *Hottell v. Farmer's Protective Assn.*, 53 P. at 329 (defendants' knowledge of Plaintiffs' *claim to rights* to use millrace on defendants' property was sufficient notice to justify imposition of the servitude.)

[65] This fact strongly supports the observance (by the parties' predecessors) of Beaubien's admonition in his Document that "[a]ccording to the corresponding rule, all the inhabitants will have the

f. 5595) Further, Taylor was on notice of the claimed servitudes in his own deed, which was executed 97 years after the date of Beaubien Document (June Order, f. 5596).[66]

A proper application of the law of servitudes to the court's findings and facts established at trial compels the conclusion that the Document created for Plaintiffs the use rights on La Sierra, what is now the Taylor Ranch.[67]

* * * *

---

rights of pastures...firewood and timber, *always taking care that one does not injure another*." *See* App. 1; *see also, Rhue v. Cheyenne Homes, Inc.*, 449 P.2d 361, 362 (Colo. 1969) (where no regulations exist as to how covenants and rules are to be enforced the law presumes good faith compliance by all who are governed by them).

[66] Taylor's seller knew the claimed servitudes were important enough to disclose, and to make the conveyance "subject to" them. Undoubtedly, their existence, which have given rise to almost 40 years of litigation, were a factor in the purchase price being a low $6.45 per acre. *See* V. 41, pl. ex. 23; *see also*, Restatement § 2.2, comment (d) at 63: "The term "subject to" can be used either to create a servitude or to disclose the fact that land conveyed is *already burdened by a servitude*." (*emphasis supplied*)

[67] Whether this court implies the burden on the Taylor Ranch by reference to the general development plan or by pre-existing use, or by application of the Restatement's rule (§ 4.2) permitting the court to supply undefined terms, and in light of the circumstances surrounding and following execution of the Document, the result will be the same. The Taylor Ranch will be properly burdened by the servitude as was intended almost 140 years ago.

[50]

2. The Treaty of Guadalupe Hidalgo and International Law Principles Governing State Succession and Protection of Human Rights Require Recognition and Enforcement of the Settlement Rights.

a. *The Treaty of Guadalupe Hidalgo protects the settlement rights.*

In Article VIII, the Treaty of Guadalupe Hidalgo states as follows:

> In the said territories, *property of every kind*, now belonging to Mexicans not established there *shall be inviolably respected*. The present owners, the heirs of these, and all Mexicans who may hereafter acquire said property by contract, shall enjoy with respect to it guarantees equally ample as if the same belonged to citizens of the United States.

9 Stat. 922 (1848) (emphasis supplied)

[51] The Treaty makes clear that *all* types of property that would have been recognized by the Mexican government *must* be respected. *Tameling*, 2 Colo. at 420 ("The eighth and ninth articles of that treaty embraced provisions similar to those contained in all treaties between civilized nations which provide for a cession of territory from the one to the other; stipulations intended to guard and protect in the most efficient manner the private property of individuals.") *cf. Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 119 S.Ct. 1187, 143 L.Ed.2d 270 (1999) (Indian treaties are to be interpreted liberally in favor of Indians and such treaties are interpreted to give effect to the terms as the Indians themselves would have understood them).

With respect to Article VIII of the Treaty, in *Astiazaran v. Santa Rita Land & Mine Co.*, 148 U.S. 80, 81, 13 S.Ct. 457,

37 L.Ed. 376 (1893), the United States Supreme Court stated as follows:

> Undoubtedly private rights of property within the ceded territory were not affected by the change of sovereignty and jurisdiction, and were entitled to protection, whether the party had the full and absolute ownership of the land, or merely an equitable interest therein, which required some further act of the government to vest in him a perfect title.

See also Fremont, 58 U.S. 542; *Reynolds v. West*, 1 Cal. 322 (1850) (the treaty protects inchoate rights); *cf. United States v. Arredondo*, 31 U.S. 691, 6 Pet. 691, 8 L.Ed. 547 (1832) (failure to commence settlement of Spanish grant because of disturbed conditions in Florida until after the Adams-Onis Treaty did not render the grant invalid for grantee and those claiming under him).

The unrebutted reports of Dr. Meyers and Dr. Stoller establish that the rights in the settlers were created in 1844, when the Grant was awarded by the Mexican government. The original Mexican settlers under the Grant established settlements as early as 1845, but they were driven back by Native Americans. V. 14, ff. 4457-8,4500-1. By 1860, permanent settlements on the Grant were populated by more than 1,700 Mexican settlers and nearly all of them were living in the ceded New [52] Mexican territory at the time of the Treaty. *See supra* at 9. These persons were precisely the class that Article VIII was designed to protect, and the settlement rights clearly fall within the definition of property rights protected under the Treaty.

The validity of land rights that were not perfected prior to the Treaty was considered in *Fremont*, *supra*. In that case a grant was awarded in 1844 but, because of hostilities in the territory, the grantee was unable to occupy the grant or have it surveyed, which were requirements of the grant under

Mexican law. The Supreme Court described the conditions of that period as follows:

> Now, it is well known that Mexico, and California as a part of it, had, for some years before, been in a disturbed and unsettled state, constantly threatened with insurrectionary and revolutionary movements; and in this state of things, the uncivilized Indians had become more turbulent, and were dangerous to the frontier settlements, which were not strong enough to resist them.

Fremont 58 U.S. at 562.

In that case, where the grantee did not occupy the grant at the time of the Treaty because of these conditions, the U.S. Supreme Court nevertheless affirmed that even an unperfected property right was protected under the Treaty. Likewise, in the present case the protection of the Treaty should apply. *See*, e.g., *Reynolds v. West*, *supra*; *United States v. Arredondo*, *supra*.

b. *The international law principles governing state succession and human rights protect the settlement rights.*

The application of the Treaty of Guadalupe Hidalgo in this case is reinforced by the international law of state succession and human rights.[77] Under the laws of nations, the property [53] rights of Mexican citizens within the ceded territories would have been sacrosanct independent of the Treaty of Guadalupe Hidalgo. *Cf. Delassus v. United States*, 34 U.S. 117, 133, 9 Pet. 117, 9 L.Ed. 71(1835). The sovereign who acquires an inhabited country, acquires full dominion over it;

---

[77] A further analysis of the application of the law of state succession to this case is set forth in the report of Dr. Meyers, at V. 14, ff. 4459-63. For further explication of the principles of international human rights law related to this case, *see* Brief of Amicus Curiae Rocky Mountain Human Rights Law Group, filed concurrently herewith.

but this dominion is never supposed to divest the vested rights of individuals to property, and an inchoate title to land is property. *Id.*; *United States v. Percheman*, 32 U.S. 51, 7 Pet. 51, 8 LEd. 604 (1833); *Soulard v. United States*, 29 U.S. 511, 4 Pet. 511, 7 L.Ed. 938 (1833); *Beard v. Federy*, 70 U.S. 478, 491-2, 3 Wall. 478, 18 L.Ed. 88 (1865) ("[Mexicans in the ceded territories] retained all such rights, and were entitled by the law of nations to protection in them to the same extent as under the law of the former government.") *see also Saroop v. Garcia*, 109 F.3d 165 (3rd Cir. 1997) (the United States is a party to the 1978 Vienna Convention on Succession of States, has ratified it, and is bound by its obligations.)[78]

* * * *

[78] The law of state succession recognizes the reality that the legal norms in conquered territories do not change simultaneously with the change in sovereignty, and in such an evolving legal regime, this law affords protection to the rights of the inhabitants. *See* Wilkinson, *The American Doctrine of State Succession* (Greenwood Press 1975) at 39: "The conqueror may deal with the inhabitants and give them what law he pleases, unless restrained by the capitulation, but until alteration be made in former laws continue." This principle is, in particular, applicable in this case where it is undisputed that even after the war, settlement of the San Luis Valley by Mexicans continued in accordance with the patterns and customs developed and followed during the periods of Spanish and then Mexican sovereignty.

APPENDIX C

SUPREME COURT, STATE OF COLORADO

---

2 E. 14th Avenue
Denver, Colorado 80203

Case No. 00 SC 527

CERTIORARI TO THE
COLORADO COURT OF APPEALS, 98CA1442
DISTRICT COURT, COSTILLA COUNTY,
CASE No. 81CV5

EUGENE LOBATO, et al.
Petitioners:

v.

ZACHARY TAYLOR, as executor
of the Estate of Jack T. Taylor, Jr., Deceased, et al.
Respondents:

Albert B. Wolf, Reg. No. 545
Raymond P. Micklewright, Reg. No. 13009
Jonathan L. Madison, Reg. No. 8749
Wolff & Slatkin, P.C.
44 Cook Street, Suite 1000
Denver, CO 80206
Telephone: (303) 355-2999

RESPONDENTS' CONSOLIDATED ANSWERS TO BRIEFS OF PETITIONERS AND THEIR AMICI

* * * *

[38]

III. THE SPANISH AND MEXICAN LAW AND CUSTOM RULINGS BELOW WERE CORRECT AND COMPELLED BY THE FACTS AND BOTH LEGISLATIVE AND JUDICIAL BINDING PRECEDENT OF THE UNITED STATES CONGRESS, THIS COURT AND THE SUPREME COURT OF THE UNITED STATES OF AMERICA.

A review of the factual, legislative and judicial history clearly establishes that, as a matter of law, petitioners have no rights under the laws and customs of Spain and Mexico or by the [39] Treaty of Guadalupe Hidalgo.

A. The Sangre de Cristo Grant Papers Do Not Grant any Rights to Anyone Other Than the Grantees, Narcisso Beaubien and Luis Lee.

1. *The Beaubien-Lee petition papers do not suggest that any lands be set aside for the common use of anyone.*

There is nothing in the language of the Sangre de Cristo grant petition papers suggesting that any land, much less the Taylor Ranch property, would be set aside for grazing or the taking of wood or timber, fish or game or for recreation by persons other than the petitioners-grantees.[51] Instead, the petition papers request a grant to Beaubien and Lee to include a "...certificate of possession which will insure to us our legal title thereto, and prevent any one from disturbing us...."

---

[51] English translations of the grant papers may be found in the U.S. Supreme Court decision in *Tameling v. U.S. Freehold & Emigration Co.*, 93 U.S. 644 (1877).

While the petition papers do mention settlement, there is nothing to suggest that the petitioners-grantees intended or were required to promote settlement by setting aside portions of the grant, particularly the Taylor Ranch parcels, for the common use of others, as petitioners speculate.

2. *The grant papers do not mention or suggest that rights are granted to anyone other than Narcisso Beaubien and Luis Lee.*

The language of the grant clearly and unequivocally grants rights solely to Beaubien and Lee in the following precise language:

> I, the aforesaid justice, in the name of sovereignty of the nation (may God preserve it), gave to the aforementioned Don Louis Lee and Don N. Beaubien the personal and perfect [40] possession which they solicit, serving as a title for them, their children and successors, in which I will protect and defend them; and I order them not to be deprived thereof without being first heard, and sentence given against them according to law and evidence.

The court of appeals below appropriately contrasted the language of the Sangre de Cristo grant with those of the Baca grant that were considered in *American Water Development, Inc. v. City of Alamosa*, 874 P.2d 352 (Colo. 1994). Like one of the grants involved in Baca, the Sangre de Cristo grant was a grant to *individuals*, not a community grant that expressly provided rights and privileges for *all of the settlers* on the grant. Petitioners long ago abandoned their claim, made in their second amended complaint (Vol. 1, p. 103, para. 6.2), that the Sangre de Cristo grant was a community land grant.[52]

---

[52] Compare the first claim for relief of peititioners' second amended complaint (Vol. 1, p. 103, para. 6.2) with the trial record establishing that the only claims made were on behalf of individual plaintiffs as Costilla County property owners.

They and their *amici* cannot now resurrect their discarded claims.

B. The Surveyor General Charged By Congress With the Duty To "...Ascertain the Origin, Nature, Character, and Extent of All Claims To Lands Under the Laws, Usages and Customs of Spain and Mexico...", Following Trial, Determined that Charles Beaubien Had Become the Sole Owner of the Grant.

In compliance with provisions assuring the rights of Mexican citizens under the Treaty of Guadalupe Hidalgo, the United States Congress established the office of Surveyor General for New Mexico mandating that he "...ascertain the origin, nature, character, and extent of all claims to lands under the laws, usages and customs of [41] Spain and Mexico...." 10 Stat. at L. 308, sec. 8 (Appendix F attached).

Following trial in 1856, the Surveyor General concluded that:

> The grant being a positive one, without any subsequent conditions attached... it is the opinion of this office that the grant is a good and valid one, and that a legal title vests in Charles Beaubien to the land embraced within the limits contained in the petition.[53]

The Surveyor General was obviously in a far superior position to determine the nature, character and extent of claims to lands under the laws, usages and customs of Spain and Mexico than petitioners, their purported experts and their *amici* almost a century and a half later. The Surveyor General's decision did not recognize any so-called "settlement rights" that are claimed by petitioners.

---

[53] The decision and recommendations of the Surveyor General are likewise included in the U.S. Supreme Court decision in *Tameling v. U.S. Freehold & Emigration Co.*, 93 U.S. 644 (1877).

C. Following the Report and Recommendations of the Surveyor General the United States Congress Confined Title to the Grant in Charles Beaubien Alone.

The June 21, 1860 Act of Confirmation by the United States Congress[54] confirmed the validity of Charles Beaubien's title to the Sangre de Cristo grant *as a private land claim*.

The importance of the 1860 Act of Confirmation was recognized by this Court and the United States Supreme Court and even by petitioners' real estate counsel who admitted to the trial court [42] below:

> I was very surprised as a real estate lawyer to discover that, for these particular kinds of interests, the rights don't start at the patent. They start at the act of confirmation. That's the time that everything sticks.

(Vol. 31, p. 2410:4-9). Petitioners co-lead counsel agreed, declaring: "Whatever rights are involved in this situation trace back to 1860. And the act of confirmation (Vol. 31, p. 2446:5-7).

Importantly, the legislation that confirmed Charles Beaubien's rights is titled "An Act to confirm certain Private Land Claims in the Territory of New Mexico." Congress thus emphasized that the Sangre de Cristo grant was not a "community land grant" (as sometimes argued or suggested by petitioners and their *amici*), but a *private* land grant.

---

[54] 1860 Act of Confirmation, 12 Stat. at L. 71, 72 (Appendix A attached).

D. This Court and the United States Supreme Court Have Ruled that the 1860 Act of Confirmation Is Binding Conclusive and Not Subject to Judicial Review.

In 1874 this Court had occasion to consider the validity of the Sangre de Cristo grant and ruled that the 1860 Act of Confirmation was incontestable and not subject to judicial review. *Tameling v. U.S. Freehold Land & Immigration Co.*, 2 Colo. 411, 423 (1874) *aff'd* 93 U.S. 644 (1877). In affirming that decision, the United States Supreme Court ruled:

> ...the confirmation [of title in Charles Beaubien by Congress in 1860] being absolute and unconditional, without any limitation as to quantity, we must regard it as effectual and operative for the entire tract.

The U.S. Supreme Court also concluded that:

> ...the invalidity of the grant has been earnestly and elaborately pressed upon our [43] attention. This is a matter for consideration of Congress; and we deem ourselves concluded by the action of that body. The phraseology of the confirmatory Act is, in our opinion, explicit and unequivocal.

Tameling v. U.S. Freehold & Emigration Co, 93 U.S. 644, 663 (1877).

In *De Mares v. Gilpin*, 15 Colo. 76, 24 P. 568 (1890) this Court again had occasion to consider the validity and effect of both the U.S. Surveyor General's decision and the *Tameling* case. That case involved a claim by grantee Luis Lee's daughter to half of the Sangre de Cristo grant. The Court rejected her claims based upon the 1860 Act of Confirmation and by her failure to take timely action to assert her claims to the grant. This Court ruled:

> ...that the acts of Charles Beaubien in applying for and securing an approval of the grant in 1856, applying f or

> and obtaining a confirmation of title in 1860, both in his own name as sole owner, to the exclusion of plaintiff, were public and notorious acts, which, from their nature, could not be concealed if such attempt had been made, of which plaintiff was bound to take notice.

Id. at 84-85, 24 P. at 571.

The United States patent was issued in the name of Charles Beaubien in 1880. Def. Ex. H5, offered Vol. 31, p. 2445:17-24, admitted Vol. 31, p. 2446:12-15. Petitioners' argument that the quit claim language in the patent supports their argument was judicially refuted by the U.S. Supreme Court in *Barker v. Harvey*, 181 U.S. 481 (1901). There, the Court considered a similar argument and ruled that the quit claim provision of the patent was nevertheless conclusive as against all persons except those who could resist successfully any action of the government in disposing [44] of the property. Under the Treaty of Guadalupe Hidalgo all of the lands situate in the present State of Colorado were ceded to the United States. The United States Supreme Court ruled that persons who had any claims predicated upon the laws, usages and customs of Spain and Mexico abandoned them by not presenting them for consideration to the Surveyor General and therefore could not successfully resist any action of the United States in disposing of the property. *Barker*, *supra*, at 491.

Despite the knowledge of petitioners' predecessors that Beaubien claimed to be the sole owner of the grant and with actual knowledge given by public statute that the government had confirmed the grant to him as sole and exclusive owner, and with the strongest motives that could prompt a person to action, they remained idle when an effort should have been made to assert their claimed rights – if they had any. *See De Mares v. Gilpin*, 15 Colo. 76, 86, 24 P. 568 (1890). Consequently, petitioners' predecessors abandoned any rights they might have claimed by not presenting them to the Surveyor General for consideration.

E. Petitioners' Mexican and Spanish Law Arguments Were Rejected by Both the Trial and Appellate Courts in the Taylor Torrens Action.

Appendix C attached includes all of the Taylor Torrens action trial court rulings. In its Order Granting and Denying Motion for Summary Judgment, the court carefully reviewed and rejected the same Mexican law arguments made in that case and repeated by petitioners. The court concluded: "...as a matter of law the defendants have no rights in the plaintiff's lands by virtue of the [45] laws of Mexico" (citing authorities). The Tenth Circuit Court of Appeals affirmed. *Sanchez v. Taylor*, 377 F.2d 733 (10th Cir. 1967). That court ruled that even if someone had acquired rights prior to the 1860 Act of Confirmation, the Act extinguished those rights. *Id.* at 736-37.

Both of the lower courts in this action concurred, finding that the conclusions of the federal courts were persuasive.

F. The Armaments of Petitioners and their *Amici* Ignore the Facts the Law and Appear To be a Studied Attempt at Revisionist History.

To sustain the arguments advanced by petitioners in this action this Court would be required to

- rewrite the 1843-44 Sangre de Cristo grant papers,[55]

- reverse the circa. 1856 findings and conclusions of the U.S. Surveyor General,

- overrule the 1860 Act of Confirmation of the United States Congress,

---

[55] Petitioners are not bashful about asking this Court to rewrite ancient documents. In their arguments concerning the Beaubien paper, they ask the Court to rewrite that paper to grant them *profits* from the Taylor Ranch. Both requests must be rejected.

- reverse its own 1874 decision in *Tameling v. U.S. Freehold Land & Emigration Co.*, 2 Colo. 411 (1874),

- reverse the 1877 U.S. Supreme Court decision in *Tameling v. U.S. Freehold & Emigration Co.*, 93 U.S. 644 (1877),

- reverse its 1890 decision in *De Mares v. Gilpin*, 15 Colo. 76, 24 P. 568 (1890),

- reject the 1965 Taylor Torrens action trial and 1967 [46] appellate court rulings,

- ignore the 1901 decision in *Barker v. Harvey*, 481 U.S. 481 (1901).

Petitioners have advanced no sound argument that would or should induce this Court to either take those actions or to ignore the binding legislative, judicial and quasi-judicial precedents that fully support the rulings below.

G. Petitioners Have Failed to Establish a Factual Record to Support Their Contention That They Were Entitled to Purported Settlement Rights on the Taylor Ranch Pursuant to Spanish and Mexican Law and Custom or the Treaty of Guadalupe Hildalgo.

The unsigned and unsworn summary judgment submittals of petitioners' purported experts upon which petitioners and their *amici* place their reliance cannot be considered for any purpose. C.R.C.P. 56(e); *Sofford v. Schindler Elevator Corporation*, 954 F.Supp. 1459, 14622-63 (D.Colo. 1997) (citing *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 158 n. 17 (1970), for the proposition that an unsworn statement submitted in support of a motion for summary judgment did not meet the requirements of Fed.R.Civ.P. 56(e)). *See also, Rainforest Café, Inc. v. Amazon, Inc.*, 86 F.Supp. 886, 903 (*D. Minn. 1999*) (*holding that unsworn expert reports which may have been prepared in compliance with expert disclosure rule will not be considered for purposes of summary judgment*);

see also, e.g. Fowle v. C & C Cola, 868 F.2d 59, 67 (3d Cir. 1989) (unsworn expert's report "is not competent to be considered on a motion for summary judgment"); *Wittmer v. Peters*, 87 F.3d 916 (7th Cir. 1996) (unsworn expert reports are "not, strictly speaking, admissible to support or oppose summary judgment"), *cert. denied*, 519 U.S. 1111, 117 [47] S.Ct. 949, 136 L.Ed.2d. 962, 968-969 (6th Cir. 1991) (unsworn statements of two employees must be disregarded). *See also Monroe v. Board of Education of the Town of Wolcott, Connecticut*, 65 F.R.D. 641 (D.Conn. 1975). The federal rule is substantively identical to Colo.R.Civ.P. 56(e).

Moreover, petitioners' reliance on writing of Michael Meyers and Myra Ellen Jenkins cannot be considered for the further reason that Jenkins died in 1993 and Meyers was prohibited from testifying at trial because of petitioners' derelictions (Vol. 13, pp. 4026-28, 4063-65). Neither Meyers nor Jenkins was therefore competent to testify at trial. C.R.C.P. 56(e) expressly requires affidavits of persons competent to testify. The Owners made timely objection to the plaintiffs' invalid submittals. (Vol. 15, pp.4933-34).

H. Finally, Petitioners Wholly Miss the Significance of the Binding Precedent Relied upon by the Lower Courts.

Petitioners misapprehend the issue to be addressed by this Court in reviewing the lower courts' rulings on the Owners' trial court motion for summary judgment. The issue is not whether the trial court misapplied Mexican law or the Treaty of Guadalupe Hidalgo in considering the motion for summary judgment, but whether applicable precedent precluded the trial court and the court of appeals from any review of the act of the United States Congress that confirmed the grant to Beaubien as "absolute and unconditional."

The lower courts concluded that pursuant to the doctrine of *stare decisis*, "any purported rights that might [have] existed...were extinguished by the 1860 confirmatory act...and

if [48] the confirmation of the title was contrary to the treaty provisions, the question was political, not judicial." Vol. 16, pp. 4917-18. Their conclusions were consistent with over a century of binding precedent.

* * * *

APPENDIX D

SUPREME COURT, STATE OF COLORADO

---

2 E. 14th Avenue, 4th Fl.
Denver, Colorado 80203

Case No. 00 SC 527

CERTIORARI TO THE
COLORADO COURT OF APPEALS, 98CA1442
DISTRICT COURT, COSTILLA COUNTY, 81CV5

EUGENE LOBATO, et al.
Petitioners:

v.

ZACHARY TAYLOR, as executor
of the estate of Jack T. Taylor, Jr., deceased, et al.
Respondents:

Jeffrey A. Goldstein
Goldstein & Dodge
1763 Franklin St.
Denver, CO 80218
Telephone: (303) 861-8580
Fax: (303) 861-1203
Att Reg. #: 4735

REPLY BRIEF

* * * *

[24]c. *Plaintiffs' prescriptive rights "vested" automatically after 18 years, in at least the early 1880s, and even assuming there was "permission" given thereafter, those rights have not been divested.*

Now that the 18-year period[49] of prescription has been demonstrated, the "title" to the prescriptive servitude is deemed fully vested in the Plaintiffs automatically as of the end of the prescriptive period, and thereafter. *See Doty v. Chalk*, 632 P. 2d 644, 646 (Colo. App. 1981). *See also* §38-41-101 ("conclusive evidence of absolute ownership" assumed in adverse possession context after 18 years). This proposition logically extends *a fortiori* to prescription rights, which are only possessory, and not fee title, interests. *See Doty, supra.*

As *Doty* explains, even a subsequent "disclaimer" of such "title" [by the claimant] *or* [25] *conduct which is inconsistent with a claim of title*,[50] has no legal effect to defeat the ripened right. *See also Palmer Ranch v. Suwansawasdi*, 920 P.2d 870, 873 (Colo. App. 1996), citing *Doty* with approval. Thus, as of at least 1883 (20 years after the 1863 Document was signed), and continuously since that time, Plaintiffs' predecessors have held these rights by prescription, if not under the Document. And upholding Plaintiffs' prescription claims gives them the rights Beaubien originally intended,

---

[49] Before 1927, the statutory period was 20 years, not 18.

[50] The law forgives a person with a ripened prescriptive right mistakenly asking "permission." Once the statutory period is up, as the trial court in this case clearly found, even if the prescribing party mistakenly "asks permission" or otherwise acts inconsistently with being the true "owner" of the rights, that *does not* defeat the ripened right which already exists. *Doty*, 632 P.2d at 646.

and on the land where they and their predecessors have long exercised them. It further denies a windfall to Respondents, who are now reneging on these recognized rights. This is precisely what the Restatement commentators sought to avoid by having prescription claims succeed under circumstances like those in this case. *See* Restatement §2.17, comment c, at 265. Plaintiffs' prescription claims should be upheld.

* * * *